STATE OF MICHIGAN

COURT OF APPEALS

RICHFIELD LANDFILL, INC, Plaintiff-Appellee, v STATE OF MICHIGAN and DEPARTMENT OF NATURAL RESOURCES, Defendants-Appellants.	UNPUBLISHED June 17, 2008 No. 272519 Ingham Circuit Court of Claims LC No. 93-015002-MZ

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendants appeal by leave granted the Court of Claims' August 3, 2006, order granting plaintiff's motion for partial summary disposition. We vacate the Court of Claims' August 3, 2006, order and remand this matter for further proceedings consistent with this opinion.

Although this case has a long and complicated procedural history,[1] the sole issue before this Court is whether the Court of Claims erred in granting plaintiff's motion for partial summary disposition based on its finding that defendants' actions constituted either a regulatory taking or inverse condemnation.

[1] This is the third time in its seventeen-year history that this case has been before this Court. In the first appeal, this Court reversed the Court of Claims' grant of summary disposition for defendants with regard to plaintiff's regulatory taking claim and remanded for further proceedings. *Richfield Landfill, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2001 (Docket Nos. 202774 and 202777). In the second appeal, this Court vacated the Court of Claims order granting plaintiff's motion for partial summary disposition with regard to that claim, and remanded this case for reconsideration of plaintiff's claim in light of the recently decided *Lingle v Chevron USA, Inc*, 544 US 528; 125 S Ct 2074; 161 L Ed 2d 876 (2005). *Richfield Landfill, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket No. 260850).

I. Facts and Procedural History

This case commenced in 1991 after defendant, the Department of Natural Resources (DNR), denied an operating license for an additional sanitary landfill cell that plaintiff constructed. The underlying facts and procedural history up to the first appeal were summarized in this Court's January 26, 2001, unpublished opinion (*Richfield I*):

> For many years, plaintiff operated a sanitary landfill in Genesee County. As plaintiff's original landfill (cell 1) was approaching the end of its useful life, plaintiff applied for a permit to construct a second landfill (cell 2) adjacent to the first. The DNR expressed concern about contaminants thought to be leaking from the first landfill, and after lengthy negotiations, plaintiff and the DNR entered into a consent order in 1989. The consent order set forth the steps required to close cell 1 and announced the DNR's approval of a specific engineering plan for the construction of cell 2. Further, the consent order provided that an operating license for cell 2 would be granted when plaintiff, among other things, redesigned cell 2 in order to satisfy certain requirements for monitoring groundwater.
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> In April 1991, a DNR official informed plaintiff by letter that it was not in compliance with the 1989 consent order and that an operating license would not be granted until plaintiff complied with DNR requirements. The DNR demanded that plaintiff substantially reconstruct cell 2 with a 'double liner/double leachate collection system' which would make it possible to differentiate any leakage from the new facility from any cell 1 leakage ('differential monitoring').
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> Thereafter, plaintiff filed suit requesting an order of mandamus, or, alternatively, appeal of the administrative decision. Plaintiff asserted that the DNR's denial of the license was arbitrary and capricious, and requested declaratory and injunctive relief. The Court of Claims ruled that mandamus was not an appropriate remedy in this situation, and treated the case as an appeal under § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631. In a November 1991 order, the court ruled that defendants could not compel plaintiff to implement differential monitoring in the form of a double-liner system, but that the DNR could require some other system of differential monitoring. The court further ruled that the DNR was arbitrary and capricious in denying an operating license for cell 2. . . .
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> In 1993, plaintiff filed identical actions with the circuit court and the court of claims. In the new actions, count I alleged that the DNR was imposing the requirements of an unpromulgated rule, count II alleged breach of contract, count III alleged deprivation of property without due process, and count IV alleged a taking of property without just compensation. The two new actions were promptly consolidated with each other, and joined with the 1991 action, for resolution by the Court of Claims. The DNR counterclaimed, alleging various statutory violations plus common-law public nuisance. Subsequently, the Court of Claims dismissed from the case all the lower level officials and employees of the DNR on the ground that only the sovereign itself, not individuals acting on its behalf, could be sued for a regulatory taking. The court further ruled that plaintiff

could not maintain an action for breach of contract but could seek specific performance of the consent order.

By way of its September 1996 order, the Court of Claims granted defendants' motion for summary disposition on counts III and IV of plaintiff's 1993 cause of action, ruling that plaintiff had failed to state a valid claim under either 42 USC 1983 or under a regulatory-taking theory....

* * *

Subsequently, the court dismissed count II of plaintiff's 1993 cause of action. The court dismissed this count on the ground that the court had rendered the contract claim moot by issuing its order that a license be granted, and rejecting plaintiff's claim for damages. For purposes of arriving at a final order that could be appealed, the parties and the court signed a final judgment and stipulated order, staying the order granting the operating license, dismissing count II of the 1991 suit without prejudice, and dismissing the DNR's counterclaim without prejudice. [*Richfield I, supra* at 2-4 (footnote omitted).]

Plaintiff appealed as of right, and defendants cross-appealed. After upholding the Court of Claims' order that the DNR issue an operating license for cell 2 based on its finding that the DNR's denial of plaintiff's license was arbitrary and capricious, this Court agreed with plaintiff's argument that the Court of Claims erred when it dismissed plaintiff's takings claim, and accordingly reversed the grant of summary disposition for defendants on the issue of a regulatory taking and remanded for further proceedings:

Because the DNR withheld the license for cell 2 for reasons that went beyond already-existing legal requirements for use of the land, the DNR's actions clearly caused a decrease in the value of the property. Whether that value was reduced to zero, however, as plaintiff contends, is a question that must be decided on evidence presented upon remand. . . . For theses reasons, we hold that the Court of Claims erred in dismissing the takings claim on a motion for summary disposition. The issue merits further evidentiary development on remand. [*Richfield I, supra* at 8-9.]

What happened after this Court's first remand, and up to the second appeal is best summarized by this Court's October 27, 2005, unpublished opinion (*Richfield II*):

On remand, a dispute arose between the parties concerning the proofs necessary to establish plaintiff's regulatory taking claim in light of this Court's . . . statements concerning the question to be decided on remand. Defendants filed a motion to clarify the law of the case and the issues on remand, arguing that consistent with this Court's January 26, 2001 decision, plaintiff could prevail on its regulatory taking claim only if plaintiff established that the value of its property had been reduced to zero.

Plaintiff disagreed, arguing that it was entitled to establish a temporary taking by showing either (1) the property value had been reduced to zero, which constituted

a categorical taking pursuant to *Lucas, supra*, or (2) there was a diminution in value and a taking under the balancing test of *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Plaintiff's counsel further argued that pursuant to the step-by-step analysis set forth in *K & K Construction, Inc v DNR*, 456 Mich 570; 575 NW2d 531 (1998), the court must first determine if the regulation advanced a legitimate state interest; if not, there was an automatic taking and that ended the analysis. If the regulation advanced a legitimate state interest, then the next step examined whether the property was deprived of value.

In deciding defendants' motion, the Court of Claims essentially agreed with plaintiff, ruling that plaintiff could establish a taking either by showing zero value or a diminution in value. In the court's view, this Court's opinion merely reflected the stage of the proceedings, i.e., that if the property value was reduced to zero, there was a categorical taking and that was the end of the analysis; otherwise, the analysis proceeded to the balancing test.

On March 5, 2003, plaintiff filed a motion for partial summary disposition, arguing that defendants' arbitrary and capricious denial of an operating permit for the landfill failed to substantially advance a legitimate state interest and, therefore, constituted a regulatory taking, and plaintiff was entitled to partial summary disposition as a matter of law. The court initially denied plaintiff's motion, ruling that the DNR's arbitrary and capricious decision was not a per se taking. . . .

Plaintiff moved for reconsideration, and the court granted the motion in an opinion and order filed October 5, 2004. The court stated that it had denied plaintiff's motion for partial summary disposition on the narrow basis that groundwater monitoring substantially advanced a legitimate government interest. However, plaintiffs admit that groundwater monitoring is a legitimate interest, but further argue that the denial of the operating permit was based on the inadequacy of groundwater monitoring.

After additional argument on rehearing, on February 1, 2005, the court issued an order and opinion granting plaintiff's motion for partial summary disposition on the issue of a regulatory taking. The court held that defendants' action constituted a regulatory taking pursuant to *Goldblatt v Town of Hempstead*, 369 US 590; 82 S Ct 987; 8 L Ed 2d 130 (1962), which recognized that the invalid exercise of the state's police power could be the basis of a regulatory taking claim. [*Richfield II, supra* at 4-5.]

In addressing the merits of the appeal, this Court recognized that the United States Supreme Court's recent decision in *Lingle v Chevron*, 544 US 528; 125 S Ct 2074; 161 L Ed 2d 876 (2005), "expressly rejected the principle that a regulatory taking could occur merely because a regulation failed to substantially advance a legitimate government interest." *Richfield II, supra* at 5. Noting that it "is undisputed that *Lingle*, if applicable, eliminates the theory of liability on which plaintiff sought, and the Court of Claims granted, partial summary disposition," this Court

vacated the Court of Claims order and remanded this case "to the Court of Claims to determine the applicability of *Lingle* in the first instance." *Id.* at 6-8.

On remand, plaintiff renewed its motion for partial summary disposition. Plaintiff argued that *Lingle* was not applicable because it was distinguishable, and even if it was not distinguishable, it should only be applied prospectively. Plaintiff argued in the alternative that even if it were found that *Lingle* was applicable, it should still be granted partial summary disposition on the alternative ground that defendants' actions constituted inverse condemnation. Defendants filed a response to plaintiff's motion on June 14, 2006, arguing that per *Dorman*,[2] *Lingle* was applicable to the case at hand, and thus, plaintiff's motion should be denied, and summary disposition should be granted in favor of defendants.

Without hearing oral argument on plaintiff's motion, the Court of Claims granted plaintiff's motion in its August 3, 2006, opinion and order. The Court of Claims found that *Lingle* was distinguishable from the case at hand because *Lingle* involved a party whose damages were "prospective and speculative" and who were seeking an injunction by making a "facial challenge to the effectiveness of a regulation," whereas in the case at hand, plaintiff suffered actual harm and damages when its "normal business operation was disrupted when it ceased landfill operations for 10 years because of [defendants' arbitrary and capricious] refusal to grant the permit," and is basing its claim "on an abuse of police powers in regulating [its] property." The Court of Claims further found that *Lingle* should only be applied prospectively, as the purpose of the regulatory takings law would not be served by a retroactive application, as "justice would be hindered if plaintiff would have to reevaluate its legal strategy after fifteen years of litigation." Finally, the Court of Claims additionally found that plaintiff "has sufficiently proven the two elements of inverse condemnation," based on its findings that defendants abused their legitimate right "to grant or deny an operating permit . . . by acting in an arbitrary and capricious manner," the denial of which "was directly aimed at plaintiff's property and was a substantial cause to the decline of the value of" plaintiff's property. We subsequently granted defendants' application for leave to appeal.

II. Analysis

As previously discussed, the Court of Claims granted plaintiff's motion for partial summary disposition based on the alternative theories that defendants' actions constituted either a regulatory taking or inverse condemnation. We review a Court of Claims' decision to grant or deny a motion for summary disposition de novo, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

We will first address defendants' argument that the Court of Claims erred when it held that defendants' actions constituted a regulatory taking. The Court of Claim's holding hinged on its conclusion that *Lingle* was distinguishable from the case at hand, and could only be applied

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[2] *Dorman v Clinton Twp*, 269 Mich App 638; 714 NW2d 350 (2006).

prospectively. Whether a judicial decision should be limited to prospective application is a question of law that we likewise review de novo. *Adams v Dep't of Transportation*, 253 Mich App 431, 434-435; 655 NW2d 625 (2002).

Prior to *Lingle* a party could establish a regulatory takings claim on one of two grounds: (1) the questioned regulation did not substantially advance a legitimate state interest, *or* (2) the regulation deprived an owner of *all* economically viable use of the property. *Agins v Tiburon*, 447 US 255, 260; 100 S Ct 2138; 65 L Ed 2d 106 (1980). In *Lingle*, however, the Supreme Court held that the "substantially advances" formula *is not a valid method* of identifying compensable regulatory takings, but rather, is a due process test, *which has no place in takings jurisprudence*. *Lingle, supra* at 541-545. *Lingle* therefore abandoned the substantially advances test, and held that a regulatory taking could only be found (1) "where government requires an owner to suffer a permanent physical invasion of her property," (2) where a regulation "completely deprive[s] an owner of 'all economically beneficial use' of her property," or (3) under the "standards set forth in *Penn Central Transp Co*."[3] *Lingle, supra* at 538-539.

Here, plaintiff has brought forth a regulatory taking claim, which, cannot be supported under the "substantially advances" formula regardless of the factual predicate behind the claim. *Lingle, supra* at 541-545. In other words, *Lingle* set forth a principle of law, i.e., "that the 'substantially advances' formula announced in *Agins* is not a *valid method*" to utilize in takings cases. *Id*. at 545. The Court of Claims therefore erred when it held that *Lingle* was factually distinguishable from the case at hand. It therefore follows that if *Lingle* is retroactively applied to the case at hand, the Court of Claims erred when it found that defendants actions constituted a regulatory taking because the actions did not "substantially advance" a legitimate state interest.

In *Dorman*, this Court, without analysis, retroactively applied *Lingle* to the plaintiff's regulatory taking claim, noting that it did not have to consider plaintiff's regulatory taking claim to the extent that it was based on the improper failure to "substantially advance legitimate state interests" test. *Dorman v Clinton Twp*, 269 Mich App 638, 646, n 23; 714 NW2d 350 (2006). Moreover, federal circuit courts have also applied *Lingle* retroactively to regulatory taking claims that were based on the "failure to substantially advance test." *Manufactured Home Communities Inc v City of San Jose*, 420 F3d 1022, 1034 (CA 9, 2005); *Spoklie v Montana*, 411 F3d 1051, 1057-1058 (CA 9, 2005). Again, however, there was no analysis of whether or why *Lingle* was applied retroactively.

Regardless of whether *Dorman* is considered binding precedent under MCR 7.215(J)(1) for the proposition that *Lingle* shall have retroactive effect, we hold that *Lingle* should nonetheless be applied retroactively. Generally, judicial opinions are given full retroactive effect. *Pohutski v Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). In rare circumstances, a holding that overrules settled precedent may properly be limited to prospective

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[3] The balancing test set forth in *Penn Central* focuses on three factors: (1) the economic impact of the regulation on the claimant, (2) the extent the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action. *Penn Central Transp Co, supra* at 124.

application "where injustice might result from full retroactivity." *Id*. at 696. Three factors to be considered when determining whether a decision should not be given retroactive application are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id*. Each of the aforementioned non-dispositive factors should be considered and weighed in conjunction with each other to determine whether a deviation from the general rule of retroactivity best serves Michigan's jurisprudence. *Adams, supra* at 435, n 5.

Application of the three-part test leads to the conclusion that the general rule of retroactivity applies here. As we have noted, the purpose of the new rule set forth in *Lingle* was to clarify takings jurisprudence by negating an invalid takings theory that "has no proper place in . . . takings jurisprudence," *Lingle, supra* at 540. The purpose of clarifying the proper scope of a constitutional provision such that the constitution is properly applied favors that the decision be applied retroactively. *Sellers v Hauch*, 183 Mich App 1, 9; 454 NW2d 150 (1990). Additionally, reliance on the *Agins* "rule" was not substantial, as the *Lingle* Court noted that its decision did not require the overruling of any of its prior holdings, *Lingle, supra* at 545, principally because the Court had never relied on *Agins* for a holding. *Id*. at 546. Indeed, the Court recognized that "the Court has merely assumed its validity when referring to it in dicta." *Id.* As Justice SCALIA just recently stated when citing to this part of *Lingle*, "a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight…." *Gonzalez v United States*, ___ US ___, ___ 2008 WL 2001954 (May 12, 2008) (SCALIA, J., concurring).

Finally, although retroactively applying *Lingle* would eliminate one prior theory that a takings plaintiff could have utilized, a plaintiff still has remaining avenues, as articulated in *Lingle*, to pursue a regulatory takings claim. Hence, retroactive enforcement of *Lingle* would not have a detrimental effect on the administration of justice. In this instance, deviation from the general rule of retroactivity would therefore not be proper. *Pohutski, supra* at 695-696; *Dorman, supra* at 646, n 23; *Adams, supra* at 435, n 5.[4] Accordingly, the Court of Claims erred when it relied on the failure to substantially advance a legitimate state interest theory to support its conclusion that defendants' actions constituted a regulatory taking. *Lingle, supra* at 541-545.

We now turn to defendants' argument that the Court of Claims erred when it found as a matter of law that defendants' actions constituted inverse condemnation. The Court of Claims based its holding that defendants' actions constituted inverse condemnation on its findings that defendants abused their legitimate right "to grant or deny an operating permit . . . by acting in an arbitrary and capricious manner," and the denial of which "was directly aimed at plaintiff's property and was a substantial cause to the decline of the value of plaintiff's property."

Inverse condemnation is a cause of action against a governmental defendant to recover the value of property that has been taken in fact by the governmental defendant, even though no

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[4] We also note that the *Lingle* Court applied it's holding to the parties in that case, which is itself a signal that the Court considered it's decision to have some retroactive effect. See *Curtis v City of Flint*, 253 Mich App 555, 564; 655 NW2d 791 (2002).

formal exercise of the power of eminent domain has been attempted by the taking agency. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). Under Michigan law, a "taking" for purposes of inverse condemnation (unlike a regulatory taking claim) means that governmental action has *permanently*[5] deprived the property owner *of any possession or use of the property*. *Spiek v DOT*, 456 Mich 331, 334, n 3; 572 NW2d 201 (1998), citing *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989); *Department of Transportation v Tomkins*, 270 Mich App 153, 161-162; 715 NW2d 363 (2006). Here, it is undisputed that plaintiff was issued an operating license for cell 2 of its landfill (the questioned property) on or around March 1, 2002. Plaintiff therefore cannot establish that defendants' actions *permanently* denied it of any possession or use of the property, and thus, the Court of Claims erred when it found that defendants' actions constituted inverse condemnation. *Spiek, supra* at 334, n 3; *Tomkins, supra* at 161-162.

Finally, we will briefly address defendants' argument that the Court of Claims erred when it failed to determine what the denominator parcel was before making its takings analysis. An integral part in a taking analysis is to determine the denominator parcel because, when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. *K & K Construction, Inc v Department of Natural Resources*, 456 Mich 570, 578-579; 575 NW2d 531 (1998). For purposes of determining the reasonableness of land use regulations, a single parcel should not be divided into discrete segments (even if it consists of multiple adjoining lots), as the effect of the regulation must be assessed as to the entire parcel and not just the affected portion of the parcel. *Id*. at 578-580. Although the Court of Claims recognized that it needed to resolve a factual dispute regarding what the denominator parcel was (i.e. whether its takings analysis should focus on the entire 350 acre parcel of plaintiff's property or only cell 2, which is only 12.12 acres), it never specifically made such a determination, nor did it ever state what portion of plaintiff's land it was considering when it found that defendants' actions constituted a regulatory taking and inverse condemnation. In failing to do so, the Court of Claims erred. *Id*.

Based on our holdings, we vacate the Court of Claims' August 3, 2006, order granting plaintiff's motion for partial summary disposition, and remand this matter to the Court of Claims to (1) determine the denominator parcel for purposes of a regulatory takings analysis, and (2) determine whether a regulatory taking occurred under the standards set forth in *Penn Central, supra*, or based on a finding that defendants' actions "completely deprived [plaintiff] of 'all

[5] For purposes of a regulatory taking claim, a taking need not be permanent. See *Lucas v South Carolina Coastal Council*, 505 US 1003, 1033; 112 S Ct 2886; 120 L Ed 2d 798 (1992) (holding that where imposition of a state regulation has effected a taking, "its limited duration will not bar constitutional relief.")

economically beneficial use' of [its] property."[6] We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering

[6] When determining whether a regulatory taking occurred, we note that the trial court should consider the fact that plaintiff was able to sell a portion of its 350 acres and ultimately sold its landfill business during the process of this litigation.